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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*,

v.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Respondent*.

PETITIONER'S RESPONSE TO "MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE"

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PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*,

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PETITIONER'S RESPONSE TO "MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE"

"Confession and avoidance" describes the "Memorandum for the Federal Power Commission." This Court has been told, in effect, that there is a conflict with the Natural Gas Act, but such conflict can be ignored. This Court has not been apprised of the exact impact of the conflict, nor of pendency of dozens of *identical* cases, and many other proceedings, controlled by the constructions below.

To the question—"Is there a conflict with the Act?" (the ultimate question here)—the Memorandum re-

sponds only with no less than five repetitious qualifications, none of which applies, *e.g.*:

> "... on the particular facts of this case ..." (Memo., p. 1)
>
> "The facts which give rise to this controversy are novel and cannot be expected to recur." (Memo., p. 1)
>
> "Viewing the case in the light of its particular facts ..." (Memo., p. 3)

The opinion below bears no such caveats. When the Eighth Circuit held that there *must* be a hearing and finding of "reasonableness" under § 4(e) or § 5(a) *before* a rate on file has binding, legal effect, that Court did not stamp on its decision that this "principle" applies only to "particular" facts. When the Eighth Circuit held that objection to a rate does not have to be made when the rate is tendered to the Commission, but that the rate may be permitted to go into effect without objection and subsequently be altered as a result of a decision in a case to which parties to the rate filing were strangers,[1] it did not restrict application of this novel pronouncement to a "particular" case.

That Court spoke clearly, not equivocally; its constructions are wrong, whether applicable in a "particular" case, or to hundreds of rates as, in fact, they are.

I. This Court must have desired a complete appraisal of the impact of the holding below. The Memorandum does not apprise the Court of basic conflicts. Specifically, the Memorandum

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[1] *Cities Service Gas Company* v. *State Corporation Commission of Kansas, et al.*, 355 U.S. 391 (1958).

(a) fails to advise of pendency of no less than forty court cases in which this *same* allegedly "novel," "non-recurring" question is *now* in issue;[2]

(b) fails to apprise this Court of the existence of the *same* allegedly "novel," non-recurring issue as a result of approximately 400 proceedings recently before the Commission, involving State of Louisiana taxes and in which collateral litigation is now imminent;[3]

(c) fails to attempt to reconcile what is now said in the Memorandum with the Commission's conclusion, less than four months ago, that the *precise* questions here "can more conveniently be decided when properly raised in individual proceedings" before the Commission (see FPC Order of February 14, 1962, Docket No. R-168, 27 Fed. Reg. 1368);

(d) fails to note that the allegedly "novel," "non-recurring" question of whether there can be retroactive refunds under the Act is pending in at least 17 cases in the Courts of Appeals;[4]

(e) fails to note the actual pendency of the same question of Commission-Court jurisdiction in collateral litigation involving rates based on disputed contract favored-nations clauses;[5]

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[2] A list of cases is set forth in Appendix *A* hereto.

[3] Pertinent excerpts from the Commission's Order of March 5, 1962, in *Texaco, Inc.; et al.*, Docket Nos. G-15,546, *et al.* (and some 400 other dockets), are reproduced in Appendix *B* hereto.

[4] A list of cases in which such question is in issue is set forth in Appendix *C* hereto.

[5] *E.g.*, *The Superior Oil Company* v. *El Paso Natural Gas Company*, now pending as Case No. 5592 in the Court of Civil Appeals for the Eighth Supreme District of Texas, El Paso, Texas.

(f) fails to note that the Kansas Corporation Commission construes the opinion below as in conflict with the Act and desires clarification by this Court;[6]

(g) fails to note that the Department of the Interior continues to demand royalty payments on Government lands in the Kansas Hugoton Field on the basis of the 11 cents price;[7]

(h) fails to apprise the Court, in connection with footnote 3 of the Memorandum, that so-called "refunds," if any, would end in the hands of distribution companies, not ultimate consumers;[8]

(i) fails to attempt to reconcile diametrically opposite positions taken by the Commission before this Court in the *Montana-Dakota* case, on the analogous question of collateral "invalidation" of a rate allegedly filed through *fraud*;[9]

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[6] The Kansas Commission's letter to this effect, dated June 1, 1962, to the General Counsel of the Federal Power Commission is reprinted as Appendix *D* hereto.

[7] Reproduced in Appendix *E*, as an example, is a demand from the Department of the Interior for such payments.

[8] See, *e.g.*, statement of Kansas law in "Petition for Writ of Certiorari to the Supreme Court of Kansas," *State Corporation Commission of Kansas, et al.* v. *Cities Service Gas Company*, No. 302, October Term, 1959, pp. 12-13. As to Missouri law, distribution companies are resisting refund orders, and the question is pending in *State ex rel. Laclede Gas Co.* v. *Public Service Commission of Missouri*, No. 16,389, Circuit Court for Cole County, Jefferson City, Missouri.

[9] See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951). Reproduced in Appendix *F* hereto are excerpts from the Briefs of the Federal Power Commission as *amicus curiae* in the *Montana-Dakota* case before the Eighth Circuit and before this Court.

VI. The Memorandum rests upon a premise that the *exact* cents per Mef effective as *the* legal rate under the Act can change by "operation" of fact *or* law to another figure *without* action upon the rate by the Commission under § 4 or § 5—a premise rejected by Courts of Appeals, other than the Eighth Circuit. The Memorandum is silent as to the construction by the Tenth and Third Circuits with which the Memorandum itself is in conflict. (See Petition for Writ, pp. 13-17.) The statements in the Memorandum also conflict with the specific prohibition upon *any* changes set forth in the Commission's letter orders "accepting" a rate for filing (*e.g.*, R. 106):

> "In the event that *any of the documents* comprising the listed rate schedules contain provisions for future *automatic* adjustments in rate and charges based upon new or increased taxes, prices paid for gas by or to others, price re-determination provisions, *or any similar provision*, your attention is directed to the fact that such provisions, *when invoked to change the rates being charged June 7, 1954, will constitute a change in such rates and charges within the meaning of Section 4(d) of the Natural Gas Act and Section 154.94 of the Commission's Regulations* under such Act as promulgated by this Commission's Order No. 174-B." (Emphasis supplied)

The Memorandum fails to refer to this specific provision of the Regulations which prohibits *any* change of the effective rate in cents-per-Mef *except* by filing a change of rate at the Commission (Section 154.94(*e*), R. 41-42):

> "The *operation* of *any provision* of the rate schedule providing *for future* or periodic *changes* in *the rate*, charge, classification, or service *after June 7, 1954*, or the effective date of any rate schedule for

initial service after June 7, 1954 *shall constitute a change in rate schedule.*" (Emphasis supplied)

Despite such prohibitions, the Eighth Circuit held that the effective rate level in cents per Mcf may be changed collaterally, without recourse to the Commission. The Memorandum does not even attempt to reconcile this conflict with the applicable Commission Regulations under the Act, but either the Eighth Circuit must be reversed, or the quoted provisions of Commission orders and Regulations are inoperative and "must be deemed" rescinded.

VII. The Eighth Circuit has held that until a "just and reasonable" rate is fixed by the Commission—done as to a negligible number of producer rates—the contract price, as construed in collateral court litigation, controls. *If* such be the law, Petitioner and all other sellers are now entitled to recover, in collateral litigation, *all* contract prices higher than rates in effect by "acceptance" for filing under the Act, retroactive to June 7, 1954. *If* such be the law, then such contract prices also prevail over rates merely "conditioned" under Section 7, and there can be no "retroactive" refunds of the difference between contract prices and such "conditioned" rates. *If* such be the law, the Eighth Circuit also has opened the door for countless new rounds of collateral litigation, not only involving Kansas and Oklahoma pricing orders, but also disputed contract clauses and the severance and gathering taxes of the States of Kansas, Louisiana and Texas.

The Memorandum also fails to note that *if* the Eighth Circuit is correct, the Commission's much-publicized "Statement of Policy"; any rates based upon settlements such as those of Western Natural Gas Company,

amicus curiae here; and regulation through public announcements of the specific rate levels which will be "accepted for filing"; are all meaningless. *If* a rate so "accepted" for filing does not control, then "contract" prices higher than such rate may be enforced in collateral litigation, as long as the Commission has made no determination of "lawfulness" of a rate as "just and reasonable," which it does not even do in accepting settlements of rate cases. (*Cf.* Memorandum here and "Brief for the Federal Power Commission in Opposition," *State of Wisconsin, et al.* v. *Federal Power Commission*, No. 754, *et al.*, October Term, 1961, pp. 6, 9, 11, 16, 19.)

This Court should fully consider these questions, reconcile the conflict among the Tenth, Third and Eighth Circuits, and make clear the limits of the Commission's primary jurisdiction and of the courts in collateral litigation.

VIII. The Memorandum attempts to distinguish the questions here from situations in which issues involving federal statutes and agency orders have been held *not* to be within the jurisdiction of the courts *de novo* (Memo., p. 4). The Memorandum states that the "dispute" here did not involve "technical meaning" of documents, but, in fact, the opinions below are replete with attempts to interpret technical meaning of Commission documents. Specifically, the technical meaning of the Commission's letter orders is very much in issue in this and the more than forty pending cases; the technical meaning of the term "acceptance for filing" is very much in issue in these cases; and the technical meaning of actions of the Commission under Section 4 is at the heart of the issue in these cases. The opinions below, to say nothing of "headnotes" such as now ap-

pear at 297 F. 2d 561, thus refute any contention that there is involved only "construction" of an "unambiguous" contract. The Memorandum's purported distinction between this case and such cases as *United States* v. *Western Pacific Railway Co.*, 352 U.S. 59 (1956), thus simply does not stand up.

There is *no* attempt here to "breathe life" into a "state" law, as the Memorandum suggests. The Memorandum avoids the basic question of whether all rates now in effect *after* such Commission action rest upon exclusive, controlling Federal law, or instead still rest upon underlying contract law, subject to change by interpretation of contracts, and Commission actions, in collateral court actions. The question *is* whether there is "life" at all under the Federal statute for a Federal rate *after* the Federal Power Commission acts, as here, in formal meeting reflected by its minutes, and issues a letter order "accepting" a specific rate for filing as "in effect" under § 4 of the Act. If there is not, regulated industry needs to be told in clear terms, without the "yes, but" vagueness of the Memorandum.

This Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), indicated that a condition precedent to a "right of restitution" *is* statutory review of Commission action under § 19, setting aside Commission action under § 4. However, the Memorandum now seems to say that the courts are to be free to treat such actions of the Commission as "void" in collateral proceedings as well. *Cf. City of Takoma* v. *Taxpayers of Takoma*, 357 U.S. 320, 336-337 (1958); *United States* v. *Morgan*, 307 U.S. 183, 195-198 (1939); *Atlantic Coast Line R. Co.* v. *State of Florida*, 295 U.S. 301 (1935).

IX. The Memorandum apparently seeks to imply that any "refunds" involved here would pass back to ultimate consumers (Memo., fn. 3). The statement of the Kansas Commission reproduced in Appendix D shows that such would not be the case in Kansas, and that so-called "refund" provisions in Federal Power Commission orders result only in "windfall" profits to pipeline and distributing companies in this situation. The Petition for Writ of Certiorari in *State Corporation Commission of Kansas, et al.* v. *Cities Service Gas Company*, No. 302, October Term, 1959, apprised this Court of the situation, which the Memorandum here does not. The Kansas Commission then made clear that if such "refunds" ever occurred, *after* compliance with all statutes, approximately 80 percent of funds involved would be "windfalls" to pipeline companies, and only 20 percent would ever reach distribution companies. As to this 20 percent, the Kansas Commission stated (Petition, pp. 12-13):

> "'. . . we believe we have no jurisdiction to compel refunds to consumers by distributing companies and any refunds by Cities Service Gas to Kansas distributors will simply be a windfall to the distributing companies without any benefit whatever to the consumer. We think it likely the other state regulatory bodies may be similarly circumstanced.'"

See also *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), where this Court noted the reason for such "windfalls" as stated by the Federal Power Commission—that if a distributing company so "*recoups again what it has already recouped from the public*, there is *no* machinery in or out of court by which others who have paid unreasonable charges to it can recover." (341 U.S. at 254, emphasis

supplied.) The Commission itself has been so advised that such is the situation here.

X. The Memorandum here ends with the cryptic, unexplained statement that courts of general jurisdiction are now "equally empowered" to determine meaning of Commission actions, what have been effective rates under the Federal Act in the past, whether there is a right of "restitution," and what are to be "deemed" legal rates now (which involve fixing the current and future rates). This statement—particularly the words "equally empowered"—adds further confusion for the regulated natural gas industry. Do the words "equally empowered" mean that the Federal Power Commission is now embracing the holding below and is willing to share its jurisdiction with courts of general jurisdiction? Such statement leaves this Court without an answer to the question posed; it also leaves unanswered the basic question as to the proper procedures under the Natural Gas Act for contesting a rate filing, now and in the future. Such a statement is clearly "in conflict with the Natural Gas Act," as is the decision below, unless the words "primary" and "exclusive," somehow, in "particular" cases, can mean "concurrent." (*Cf.* Section 19(b) of the Act.)

This Court has clearly indicated that where there is a conflict in interpretation of the provisions of the Natural Gas Act, "the route to review by this Court is open." *Pan American Petroleum Corporation* v. *Superior Court*, 366 U.S. 656, 665 (1960). The Tenth and Third Circuits adhere to the exclusive review procedure of § 19(b); the Eighth Circuit holds otherwise. The question presented is fundamental to control of all rates filed under the Act and to certainty and stability in a regulated industry. The opinion below clearly is

in conflict with the Act and should not be left unreviewed by this Court.

For the foregoing reasons and those stated in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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